No. 95-1181 (8)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

WILLIAM C. DUNN and DELTA CONSULTANTS, INC.,

Petitioners,

—v.—

COMMODITY FUTURES TRADING COMMISSION, DELTA OPTIONS, LTD. and NOPKINE CO., LTD.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF CRÉDIT LYONNAIS, BANK JULIUS BAER & CO. LTD., THE CHASE MANHATTAN BANK, N.A. AND SOCIÉTÉ GÉNÉRALE, AMICI CURIAE, IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the "Treasury Amendment" (7 U.S.C. § 2(ii)) to the Commodity Exchange Act ("CEA") (7 U.S.C. § 1 *et seq.*)—which provides in pertinent part that "[n]othing in this chapter shall be deemed to govern or in any way be applicable to transactions in foreign currency . . . unless such transactions involve the sale thereof for future delivery conducted on a board of trade"—exempts from regulation under the CEA *off*-exchange foreign currency options.

PARTIES TO THE PROCEEDING

All parties to this proceeding are identified in the caption.*

* Filed herewith are the consents both of petitioners and respondents to the filing of this *amicus* brief.

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STATEMENT OF INTEREST

Amici are all banks with offices or branches in major money-centers, including New York. All are active, world-wide participants in the over-the-counter ("OTC") foreign currency market. This market is not an organized exchange. Rather, it is an informal, private, telephone and electronic marketplace of commercial and investment banks, foreign

currency brokerage companies, corporations, pension and mutual fund managers, cash managers, insurance companies, governments, and central banks whose activities regularly involve foreign currency trading. Trading is conducted twenty-four hours a day with quotations available globally on computer screens and by telephone. The Federal Reserve Bank of New York (on behalf of the United States), foreign central banks and foreign governments utilize this OTC market to implement policies relating to their currencies. This market also facilitates access to international markets for goods and services by providing the foreign currency necessary for transactions worldwide.

In this market, dealers, such as *amici*, and other participants make large transactions in virtually all currencies. These transactions are all privately negotiated and settled, typically by telephone or computer.

Integral to this vast market are currency options, in which *amici* also deal. An option provides the right, but not the obligation, to purchase or sell currency in the future. When traded on organized exchanges, currency options are standardized contracts in which a limited number of currencies and option terms are offered. By contrast, the terms of off-exchange options are freely negotiable, can be denominated in any currency, and are customized by the parties to suit their particular circumstances. *Daily* volume of off-exchange currency options in April, 1995 was estimated to be $40 billion[1] and is widely believed to have increased since that date. Many times more currency options are traded in privately negotiated, OTC transactions than on organized exchanges (*Id.*). This clear preference for trading currency options off-exchange is explained by the flexibility of terms, ease of participation and superior liquidity of that market.

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[1] Fed. Reserve Bank of N.Y., Survey of Derivative Markets Activity, at Table 5 (Bank for International Settlements December 18, 1995).

As active participants in the OTC currency market, *amici* are greatly concerned by the decision below. If affirmed, it would subject off-exchange trading in currency options to regulation under the Commodity Exchange Act (the "CEA"). Affirmance would result in significant costs to market participants such as *amici*,[2] enormous uncertainty over the enforceability of billions of dollars of outstanding currency options contracts and competitive advantages to market participants in other parts of the world who could trade beyond the reach of the CEA.

Amici are also interested parties because they and petitioners William Dunn and Delta Consultants, Inc. ("Dunn/Delta") have been named as defendants in related civil litigation now pending in the United States District Court for the Southern District of New York.[3] That litigation was brought by purchasers of investment contracts in a hedge fund operated by Dunn/Delta (the "Fund"). The Fund allegedly traded foreign currency options with, among others, *amici*. The plaintiff investors have alleged that *amici* violated the anti-fraud provisions of the CEA.

Amici Crédit Lyonnais and Bank Julius Baer moved to dismiss the investors' CEA claims on the ground, among others, that the CEA does not apply to the foreign exchange trading activities alleged in the investor complaints. As the Petition

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[2] Those costs include incurring the expense of registration and compliance that attend CFTC regulation, meeting capital requirements imposed by the CEA, being forced to trade on a CFTC designated exchange and being exposed to private rights of action under the CEA.

[3] *Amici* were all originally named as defendants in *Sundial Int'l Fund* v. *Delta Consultants*, 94 Civ. 118 (TPG). Subsequently, claims against *amicus* The Chase Manhattan Bank, N.A. were dismissed without prejudice. *Amici* Crédit Lyonnais and Bank Julius Baer are also defendants in companion suits entitled *Musashi Ltd.* v. *Delta Consultants*, 95 Civ. 3773 (TPG) and *Mablyn Investments Ltd.* v. *Delta Consultants*, 95 Civ. 3774 (TPG).

raises that very issue, *amici* are keenly interested in its disposition.[4]

STATUTORY PROVISION INVOLVED

The "Treasury Amendment" to the CEA, Section 2(a)(1)(A)(ii), codified at 7 U.S.C. § 2(ii), provides as follows:

> Nothing in this chapter shall be deemed to govern or in any way be applicable to transactions in foreign currency, security warrants, security rights, resales of installment loan contracts, repurchase options, government securities, or mortgages and mortgage purchase commitments, unless such transactions involve the sale thereof for future delivery conducted on a board of trade.

STATEMENT OF THE CASE

Amici adopt the statement of the case set forth in the Petitioners' Brief.

SUMMARY OF ARGUMENT

The words "transactions in foreign currency" plainly include foreign currency options. The obvious meaning of these words is confirmed by the specific and repeated subclassification of "options" within "transactions" in the statutory description of CEA jurisdiction.

The Second Circuit held that options are not "transactions in foreign currency" unless and until they are exercised. Making jurisdiction depend on whether options are exercised results in an unpredictable and unprincipled jurisdictional boundary and cannot be what Congress intended. Moreover, in treating options differently than futures, the Court of Appeals' interpretation disregards practical economic reality. Futures are economically indistinct from certain arrangements of options. Just as futures are unquestionably "transactions in foreign currency," so are options.

A decision by the Court that the Treasury Amendment includes options will not leave retail investors unprotected. Ample protection is provided by the securities laws, other statutes and the common law.

The so-called "Trade Option" and "Swap" exemptions issued by the CFTC do not adequately insulate off-exchange currency markets from the adverse effects Congress sought to eliminate by enacting the Treasury Amendment. The two exemptions improperly limit the Treasury Amendment's broad exclusion and, as complex regulations subject to CFTC interpretation or withdrawal, do not offer the certainty and clarity of the Treasury Amendment's plain language.

ARGUMENT

I. The Treasury Amendment Plainly Excludes Foreign Currency Options from the CEA's Jurisdiction.

The plain meaning of the Treasury Amendment is that all transactions, including options, which have foreign currency as their subject are exempt from the CEA. The Court of Appeals decision is a dramatic departure from the "plain meaning" principles of statutory construction which the Court has mandated. "[T]he starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordi-

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[4] As against the bank defendants, the district court has limited the CEA claims and dismissed certain non-CEA claims. *See Sundial Int'l Fund* v. *Delta Consultants*, 923 F. Supp. 38 (S.D.N.Y. 1996). Reversal of the decision below would require dismissal of the remaining CEA claim.

narily be regarded as conclusive." *Consumer Prod. Safety Comm'n* v. *GTE Sylvania*, 447 U.S. 102, 108 (1980).

The Treasury Amendment excludes from the Act's coverage, *inter alia*, all "transactions in foreign currency . . . unless such transactions involve the sale thereof for future delivery conducted on a board of trade." This is broad language. However, the decision below reads the Treasury Amendment very narrowly. Without elaboration or enthusiasm, the Second Circuit simply deferred (58 F.3d at 53) to its earlier opinion in *CFTC* v. *American Bd. of Trade*, 803 F.2d 1242 (2d Cir. 1986), which briefly concluded that an option to purchase or sell foreign currency does not become a transaction in that currency, and thereby exempt from the CEA, "unless and until the option is exercised" (*Id.* at 1248).[5]

The Second Circuit's view conflicts with the sweeping dimension of "transactions" in the CEA and violates "the normal rule of statutory construction [which] assumes that 'identical words used in different parts of the same act are intended to have the same meaning.' " *Sorenson* v. *Secretary of Treasury*, 475 U.S. 851, 860 (1986), *quoting Helvering* v. *Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934). Quite simply, "options" are a subset of "transactions." For example, the CEA defines "options" to be "*transactions* which are of the character of, or are commonly known to the trade as 'options.' " 7 U.S.C. § 5 (emphasis added).

Similarly instructive is the CEA's jurisdictional section, the subparagraph immediately preceding the Treasury Amendment, which catalogues the commercial activities falling

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[5] The Court of Appeals intimated that it may have had "doubts . . . about the interpretation given the Treasury Amendment in *American Board of Trade*" but believed itself constrained to follow its earlier decision (58 F.3d at 54). That case (1) involved a self-styled "American Board of Trade" which sold options to private individuals on a hodgepodge of commodities ranging from plywood to platinum and (2) devoted barely three paragraphs to whether the Treasury Amendment applied to the few foreign currency options which had been traded.

within the CEA.[6] The word "transaction" is used in that listing to help define the word "agreement" to include "any transaction which is of the character of, or is commonly known to the trade as, an 'option' . . . " By classifying an "option" as a "transaction," the CEA includes options on foreign currency within the Treasury Amendment's reference to "transactions in foreign currency."

The Court of Appeals' interpretation also collides with the everyday meaning of the words "transactions in foreign currency." The Fourth Circuit has correctly termed that phrase "broad and unqualified." *Salomon Forex* v. *Tauber*, 8 F.3d 966, 975 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1540, *reh'g denied*, 114 S. Ct. 2156 (1994).[7] To carve "foreign currency options" out of "transactions in foreign currency" inevitably leads to distortion and confusion. Even the CFTC has run afoul of the construction it now advocates. For example, in requesting public comment on applications from several

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[6] Sec. 2(a)(1)(A)(i) of the CEA, 7 U.S.C. § 2(i), states in pertinent part:

> The Commission shall have exclusive jurisdiction, except to the extent otherwise provided in subparagraph (B) of this paragraph, with respect to accounts, agreements (*including any transaction which is of the character of, or is commonly known to the trade as, an "option"*, "privilege", "indemnity", "bid", "offer", "put", "call", "advance guaranty", or "decline guaranty"), and transactions involving contracts of sale of a commodity for a future delivery, traded or executed on a contract market designated pursuant to section 5 of this Act or any other board of trade, exchange, or market, and transactions subject to regulation by the Commission pursuant to section 19 of this Act. (Emphasis added).

[7] The Fourth Circuit's analysis of the Treasury Amendment in *Salomon Forex* was notably more thorough than that employed in either Second Circuit decision. The Fourth Circuit discussed at length the history and purpose of the CEA, the words of the Treasury Amendment and the Treasury Amendment's legislative history before concluding that "all off-exchange transactions in foreign currency, including futures and options, are exempted from regulation by the CEA." 8 F.3d at 976.

exchanges for exemptions for certain exchange-traded futures and options contracts, the CFTC, in describing one aspect of the requested exemption, referred to "currency transactions (*including* but not limited to spot, forward, *option* and/or swap *transactions*)" (emphasis added).[8] This usage illustrates the broad meaning generally given "transactions." Surely, if options are "currency transactions" they must also be "transactions in currency."

II. The Jurisdictional Boundary Delineated in the Decision Below Cannot Be What Congress Intended.

The Court of Appeals' reading of the Treasury Amendment creates a perplexing and unworkable jurisdictional boundary. First, it makes CEA jurisdiction a function of the unforeseeable market forces which determine whether an option will be exercised. Second, it draws a distinction between options and futures which is wholly foreign to the CEA. Because options and futures share common elements and are substantially interchangeable from an economic perspective, there is no reason to treat them differently for jurisdictional purposes.[9]

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[8] Exemptions for Certain Exchange-Traded Futures and Options Contracts, 58 Fed. Reg. 43,414, 43,415 (1993).

[9] *See* United States General Accounting Office, *Financial Derivatives: Actions Needed to Protect the Financial System* at 26-27 (May 1994):

> Forwards and futures are contracts that obligate the holder to buy or sell a specific underlying [commodity] at a specific price, quantity, and date in the future.
>
> * * *
>
> Option contracts, which can be either customized and privately negotiated or standardized, give the purchaser the right to buy (call option) or sell (put option) a specified quantity of a commodity or financial asset at a particular price (the exercise price) on or before a certain future date . . .
>
> Options differ from forwards and futures in that options do not require the purchaser to buy or sell the underlying. A purchaser will not exercise an option until the market price of the underlying is greater than the exercise price for a call option or less than the exercise price for a put option. Options that are not exercised expire with no value.

A. CEA Jurisdiction Must Be Predictable.

The first problem with the Second Circuit's decision is that participants in the foreign currency option market will never know if their activities will ultimately be governed by the CEA. Neither the purchaser nor seller of an option can know at the time of purchase or sale whether the option will be exercised. To decide that the CEA governs an off-exchange currency option "unless and until the option is exercised" is to make application of the CEA solely a function of (1) the market forces which determine whether the option has any value and (2) the financial judgment of the option holder. This shifting jurisdictional definition cannot provide the predictability necessary for a smoothly functioning market and cannot be what the Treasury Amendment means. If adopted, it will leave the CEA with jurisdiction over options which the holder deemed unprofitable and did not exercise, but exclude jurisdiction over options which were "in the money" and were, therefore, exercised.

The Treasury Amendment was intended to avoid "an adverse impact on the usefulness and efficiency of foreign exchange markets for traders and investors" which the 1974 expansion of the CEA had otherwise threatened. S. Rep. No. 1131, 93rd Cong., 2d Sess. 49-51 (1974) *reprinted in* 1974 U.S.C.C.A.N. 5843, 5888 ("Legislative History"). The Second Circuit's confusing jurisdictional boundary would have exactly that undesirable effect.

B. Options and Futures Are Equivalent for Purposes of the Treasury Amendment.

The second problem is that the jurisdictional boundary resulting from the Court of Appeals' decision affects options

differently than futures, thereby engrafting a distinction on the CEA which has little economic meaning and is inconsistent with the statute itself. Logic and economic reality demand that "transactions in foreign currency" include "futures" and, therefore necessarily, options.

By its terms, the CEA regulates neither commodity spot transactions nor forwards, both of which result in physical delivery. 7 U.S.C. § 1a. This is because the CEA was meant to address manipulation, speculation and other perceived abuses that may arise from futures and options trading. 7 U.S.C. § 5; *Salomon Forex*, 8 F.3d at 970, 971. To avoid being redundant and meaningless, the Treasury Amendment's jurisdictional exclusion must relate to something other than spot and forward transactions. The only remaining possibilities are futures and options.

The 1974 amendments to the CEA broadened the scope of "commodities" to be regulated under the Act to include specified agricultural products and "all other goods and articles . . . and all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in." 7 U.S.C. § 1a(3). *Merrill Lynch* v. *Curran*, 456 U.S. 353, 365 (1982). No distinctions were made between futures and options for jurisdictional purposes. Both were made subject to the CEA. *See* 7 U.S.C. § 5. But for the Treasury Amendment, which was also added in 1974, foreign currency futures and options would be regulated by the CEA.

Under the CEA, foreign currency futures are unquestionably "transactions in foreign currency." *See* 7 U.S.C. § 5 ("*Transactions in commodities* involving the sale thereof for future delivery as commonly conducted on boards of trade and *known as 'futures'* are affected with a national public interest." (emphasis added)); CFTC Statutory Interpretation Regarding Trading in Foreign Currencies for Future Delivery, 50 Fed. Reg. 42,983 (1985) (Treasury Amendment's exclusion

applies to off-exchange currency futures transactions between "sophisticated parties.").[10]

Classifying "foreign currency futures" within "transactions in foreign currency" necessarily requires that options also be included. Both futures and options are instruments permitting suppliers, processors and distributors to transfer price risks to speculators willing to take the risk. Futures and options do not involve contemporaneous delivery of the subject commodity and often do not culminate in delivery. Both involve the purchase of a promise—a contract right—and only indirectly concern the underlying subject matter. *Salomon Forex*, 8 F.3d at 975. As the Seventh Circuit has pointed out, "it is almost always possible to devise an option with the same economic attributes as a futures contract (and the reverse)." *Chicago Mercantile Exchange* v. *SEC*, 883 F.2d 537, 543 (7th Cir. 1989) (citing the CFTC's arguments that options on securities should be regulated as futures), *cert. denied*, 496 U.S. 936 (1990). *See also Salomon Forex*, 8 F.3d at 975, 976; R. Kolb, *Understanding Futures Markets*, 594-610 (3d ed. 1991) (describing creation of "synthetic" futures positions by using combinations of options).

Hence, construing the Treasury Amendment to apply to futures transactions but not to options would achieve no meaningful result. It would simply invite the recasting of transactions previously characterized as "options" into new transactions awkwardly structured as "futures."[11] And, as

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[10] *See also* the Treasury Department's letter to the Senate Committee on Agriculture and Forestry, which prompted the Treasury Amendment. It "strongly urge[d] the Committee to amend the proposed legislation to make clear that its provisions would not be applicable to *futures trading* in foreign currencies . . ." (emphasis added). *Legislative History* at 5889.

[11] As is clear from the *amicus* brief of the United States in *Salomon Forex* (Appendix D to the Petition for a Writ of Certiorari), the Department of the Treasury and the Securities Exchange Commission construe the Treasury Amendment to exclude a broad class of currency transactions, including options, from the CEA. "[W]hether structured as

noted, it would draw a jurisdictional line between futures and options which has no statutory antecedent.

III. Barring the Claimed CEA Jurisdiction Will Not Leave Retail Investors Unprotected.

Contrary to the CFTC's claim, investors will still be adequately protected if the CEA is held not to apply to off-exchange trading of foreign currency options. Moreover, such policy arguments may not be considered when the language of the statute is clear. *Central Bank of Denver* v. *First Interstate Bank of Denver*, 511 U.S. 164, 114 S.Ct. 1439, 1453-54 (1994). ("Policy considerations cannot override our interpretation of the text and structure of the [Securities] Act, except to the extent that they may help to show that adherence to the text and structure would lead to a result 'so bizarre' that Congress could not have intended it."); *United States* v. *Rutherford*, 442 U.S. 544, 555 (1979) ("Under our constitutional framework, federal courts do not sit as councils of revision, empowered to rewrite legislation in accord with their own conceptions of prudent public policy.")

The SEC's clear jurisdiction over such fraudulent acts as were allegedly perpetrated by Dunn/Delta removes any concerns that reversal will leave an "enforcement gap." As the Court of Appeals noted, Dunn/Delta traded no options of any kind with the allegedly defrauded investors. 58 F.3d at 51. Rather, Dunn/Delta solicited money from investors, commingled the funds in order to trade foreign currency options on the OTC market[12] and memorialized the arrangement through an investment contract with investors.[13]

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a future contract or an option" the United States supported the district court's holding in *Salomon Forex* that "[a]ll transactions in which foreign currency is the actual subject matter of an off-exchange contract for future delivery are exempt from the CEA" (*Id.* at p. 16d).

[12] CFTC complaint at ¶¶ 11, 12; Joint App. at 6, 7.

[13] See Exhibits K and L to the Affidavit of Glenn Spann, dated April 5, 1994 in support of the CFTC's Application for an Ex Parte Restraining Order, certified record, item 2.

These contracts were prototypical securities well within the SEC's jurisdiction. Section 2(1) of the Securities Act of 1933, 15 U.S.C. § 77b(1), defines "security" to include "any . . . investment contract." "[A]n investment contract for purposes of the Securities Act means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party." *SEC* v. *W.J. Howey Co.*, 328 U.S. 293, 298-99 (1946). Here, all of the characteristics of a security were met.

The SEC has not hesitated to exercise its enforcement jurisdiction over the sale of investment contracts to investors who believed, as with Dunn/Delta, that proceeds would be used in trading foreign currency. *SEC* v. *Bankers Alliance Corp.*, 881 F. Supp. 673 (D.D.C. 1995) (SEC enforcement action regarding program using investor funds for highly leveraged trading in foreign currencies and debentures); *SEC* v. *Clark*, S.E.C. Litig. Rel. No. 13169, 1992 SEC LEXIS 525 (February 18, 1992) (announcing permanent injunction entered against seller of unregistered investment contracts for purposes of trading foreign currencies on the interbank foreign currency market); *SEC* v. *Williams*, S.E.C. Litig. Rel. No. 13124, 1991 SEC LEXIS 2877 (Dec. 18, 1991) (announcing disgorgement order); *SEC* v. *Monex Int'l*, S.E.C. Litig. Rel. No. 7057, 1975 SEC LEXIS 959 (Aug. 25, 1975) (announcing permanent injunction). The securities claims of private litigants have also been sustained in these circumstances. *See, e.g., Wagman* v. *FSC Securities*, Fed. Sec. L. Rep. (CCH) ¶92,445 (N.D. Ill. 1985) (sale of "Caprimex Currency Hedge Accounts" was sale of security).

Even apart from the securities laws, fraud respecting currency transactions can be addressed by federal mail fraud (*see, e.g., United States* v. *Queen*, 4 F.3d 925 (10th Cir. 1993), *cert. denied*, 114 S.Ct. 1230 (1994); *see also United States* v. *Brien*, 617 F.2d 299, 310 (1st Cir.), *cert. denied sub nom., Labus* v. *United States*, 446 U.S. 919 (1980)) and RICO

statutes (*United States* v. *Faulkner*, 17 F.3d 745 (5th Cir. 1994) (Ponzi scheme)), and by state law. 7 U.S.C. § 16(e) (preserving application of state statutes to transactions in commodities not conducted on a board of trade); *see In Re E.K. Capital Corp.*, No. 80-16C, 1980 Ill. Sec. LEXIS 96 (Ill. Sec. Dept. 1980); *Currency Trading Int'l* v. *Dept. of Banking and Fin.*, 1995 Fla. Sec. LEXIS 64 (Fla. Dept. Banking & Fin. 1995). In addition, private parties have a considerable array of statutory and common law claims which can be asserted. *E.g.*, *Bishop* v. *Commodity Exchange*, 564 F. Supp. 1557 (S.D.N.Y. 1983) (CEA did not preempt private causes of action under New York's Martin Act).[14]

What this case ultimately concerns is the CFTC's apparent desire to participate in the regulatory jurisdiction of other agencies when the Congress has specifically excluded it. The plain meaning of the congressional exclusion should be enforced.

IV. The CFTC's Trade Option and Swap Exemptions Conflict with the CEA and Will Not Eliminate Adverse Consequences of an Affirmance.

If, as the Second Circuit held, off-exchange foreign currency options are governed by the CEA, they are illegal and unenforceable if not traded in compliance with the CEA. Affirming that decision would undermine the global currency markets. The CFTC can be expected to argue that those markets are adequately insulated by reason of its "trade option exemption" and its "swaps exemption." Both are limited, however, and both can be withdrawn or reinterpreted by the

[14] Parallel to the CFTC's action against Dunn/Delta, investors who have sued Dunn/Delta have asserted many claims besides those under the CEA. These include violations of Section 10(b) of the Securities Exchange Act and Rule 10b-5 thereunder, Section 20(a) of the Securities Exchange Act, Section 12(2) of the Securities Act, Section 15(a) of the Securities Act, RICO, RICO conspiracy, common law fraud, conversion, gross negligence, negligence and breach of contract. Dunn/Delta have not moved against any of these claims.

CFTC on short notice—an outcome Congress sought to avoid by enacting the Treasury Amendment. Congress intended and clearly stated that options are "transactions in foreign currency" and outside the CEA.

The trade option exemption, 17 C.F.R. § 32.4, exempts from CEA jurisdiction commodity options offered by a person who

> has reasonable basis to believe that the option is offered to a producer, processor, or commercial user of, or a merchant handling, the commodity . . . and that such producer, processor, commercial user or merchant is offered or enters into the commodity option transaction solely for purposes related to its business as such.

The purpose of this language "is to exempt the acquisition of a commodity option for a non-speculative purpose by a commercial enterprise engaged in transactions in physical commodities from the requirements of the [CFTC's] option regulations."[15]

How this exemption might apply to most foreign currency options traded in the OTC currency market is far from clear. Even if strictly non-speculative, off-exchange currency options transactions are exempt when engaged in by banks, other transactions by banks and options transactions generally by mutual funds, pension plans, insurance companies, corporations and other large market participants with billions of dollars in foreign currency exposure are not covered. Even the Court of Appeals only believed this exemption deflected warnings of dire consequences to the currency markets "to a degree." 58 F.3d at 54. *See also Bd. of Trade of Chicago* v. *SEC*, 677 F.2d 1137, 1144 & n.14 (7th Cir.) (exemption is a "limited exception[ ] for merchants in the underlying commodity during the course of their business") *vacated as moot*,

[15] Proposed Reissuance of and Amendments to Regulations Permitting the Grant, Offer and Sale of Options on Physical Commodities, 46 Fed. Reg. 23,469 (1981).

459 U.S. 1026 (1982); *see generally* Glisson, *United States Regulation of Foreign Currency Futures and Options Trading: Hedging for Business Competitiveness*, 8 J. Int. L. Bus. 405, 414-15, 430-31 (1987).

The CFTC may also suggest that the so-called "swaps exemption" affords market participants sufficient protection (17 C.F.R. § 35). However, the effect of that exemption is to limit the OTC foreign exchange market (contrary to the Congressional prohibition in the Treasury Amendment) by exempting only certain types of transactions (i) between "eligible swap participants," (ii) "not part of a fungible class of agreements that are standardized as to their material economic terms," (iii) with creditworthiness of any party having an actual or potential obligation under the swap agreement a material consideration and (iv) not "entered into and traded on or through a multilateral transaction facility."

Whatever ambiguity exists in "transactions in foreign currency" is as nothing compared to the complexities inherent in these exemptions. It is not too gloomy to predict that market participants forced to parse out these exemptions in order to avoid entering into illegal and unenforceable contracts will be strongly inclined to conduct their business elsewhere, to the detriment of the United States. That result would surely betray both the intentions of the Treasury Department in proposing the Treasury Amendment and the Congress in enacting it.

CONCLUSION

The decision of the Court of Appeals should be reversed.

Dated: July 12, 1996

Respectfully submitted,

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